Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02–1088–06 OF 2014
BALIA YUSOF, HAMID SULTAN AND IDRUS HARUN JJCA
25 APRIL 2016

Land Law — Strata title — Common property — Purchasers of units in resort condominium had entered into sale and purchase agreement ('SPA') and deed of mutual covenant ('DMC') — Defendant acquired 149 parcels of development and 22 additional facilities from Danaharta — Whether SPA and DMC should be read together to ascertain intention of parties — Whether additional facilities were common property of development — Whether DMC indicated additional facilities were expressly excluded from common property — Whether plaintiffs were approbating and reprobating with obvious intent to defeat clear and unambiguous terms in DMC — Whether plaintiffs estopped from resiling from terms and covenants — Whether trial judge failed to make reference to DMC — Whether failure amounted to misdirection — Whether misdirection warranted appellate interference

The plaintiffs/respondents ('the plaintiffs') were purchasers and owners of individual housing parcel units in a luxury resort condominium housing development in Melaka known as Riviera Bay Resort Condominium ('RBRC'). RBRC was comprised in a high rise building of 550 subdivided parcels and the common property, which was not comprised in the 550 parcels. As the 550 subdivided parcels in the RBRC were agreed to be given strata titles to the purchasers and owners of the housing parcel units, the RBRC was governed by the Strata Titles Act 1985. In addition, the RBRC was also subject to and governed by the Housing Development Act 1966 and Housing Developers Regulations 1989 ('the Regulations'). At the time when the plaintiffs entered into a sale and purchase of the RBRC, there was no statutory control as to how the common property was to be used, divided or reserved by the developer. Thus, the issue of common property was done through a deed of mutual covenant ('DMC'). The defendant/appellant ('the defendant') was the purchaser of 149 of the 550 parcels of the RBRC as well as some parts of the common property from Danaharta under a statutory sale. The plaintiffs' filed a civil suit against the defendant claiming that the sale and purchase agreement that the defendant had entered into for the purchase of 149 parcels of the RBRC was illegal, void and unenforceable because it was not in the form prescribed in Schedule H and thus in blatant violation of reg 11 of the Regulations. In the premises the plaintiff claimed that the defendant was not a purchaser of owner of any parcel in the RBRC and had not acquired any rights in the common property. The plaintiffs also claimed that the entire common

property was vested in the original developer/vendor of RBRC, which held the same as constructive trustee for all purchasers of the 550 parcels. As such, it was the plaintiffs' contention that the defendant was not entitled to use, occupation or enjoyment of any portion of the common property. By way of this suit the plaintiffs sought inter alia declarations that the entire common property was vested in the original developer/vendor of RBRC (now in liquidation), which held the same as constructive trustee for all purchasers of the 550 parcels in RBRC and that the defendant was not entitled to use, occupation or enjoyment of the common property in RBRC. The plaintiffs also prayed for injunctions to retrain the defendant from using, occupying or carrying on any commercial activities in the common property in RBRC as well as damages for trespass and nuisance with interest and costs. The trial judge ruled that the condominium project consisted of the 550 parcels in RBRC and that the balance of land, which was referred to as common property, could not be a subject matter of the sale. Hence this appeal wherein the defendant claimed that the trial judge had erred in fact and law by not taking into consideration the fact that each of the plaintiffs had voluntarily signed a DMC when they entered into a sale and purchase agreement with the original developer/vendor. The defendant submitted that under the terms of the DMC the plaintiffs had acknowledged that the RBRC was designed and intended to be operated as a holiday resort cum condominium project and that the 22 additional facilities for the resort, which had been acquired by the defendant, did not form part of the common property.

Held, allowing the appeal with costs:

(1) The plaintiffs as purchasers had signed the SPA and the DMC when they purchased their respective parcels. Thus these agreements, which were executed contemporaneously, formed part of one transaction and ought to be read together as if they were one in order to ascertain the intention of the parties. Under the SPA, the plaintiffs were fully appraised of the fact that the common property or facilities of the RBRC did not form part of the subject property. In fact, the common property or facilities of the RBRC, comprising 22 facilities for the resort with an area of 78,943 sqft, was acquired by the defendant together with the 149 parcels of the RBRC. In addition, the terms of the DMC, in particular cl 4.1 of the DMC indicated that the additional facilities were expressly excluded from the common property. However, the trial judge completely disregarded the DMC and made a fundamental mistake when he found that these additional facilities were common property of the RBRC. The trial judge's failure to make reference to the DMC and failure to appreciate that the 22 facilities purchased by the defendant from Danaharta were not the same common facilities purchased by the plaintiff from the developer was a material non-direction. This

non-direction amounted to misdirection, which warranted appellate interference (see para 8(a)–(e) & (l)).

(2) Further, the plaintiffs had entered into the DMC fully cognisant of the fact that the RBRC was designed and intended to be operated as a holiday resort cum condominium project and agreed that there would be some additional facilities in RBRC (the 22 additional facilities), which would not form part of the common property. However, the plaintiffs had conveniently disregarded their agreement with the developer, when they commenced this action against the defendant (see para 8(f)–(g) & (i).

(3) It was abundantly clear that the plaintiffs were approbating and reprobating with an obvious intent to defeat the clear and unambiguous terms and covenants they had entered into with the developer pursuant to their respective SPAs and DMC. When some of the plaintiffs had leased back their parcels to the resort operator, they had not claimed that the additional 22 facilities were common property. However, some 15 years later and after the end of the plaintiffs' leaseback arrangement they were now claiming the 22 facilities belonging to the defendant, being the resort operator, as common property. Accordingly, the plaintiffs were estopped from resiling from the terms and covenants, which they had consented and agreed upon in the SPA and DMC (see para 8(j)–k)).

[Bahasa Malaysia summary

Plaintif-plaintif/responden-responden ('plaintif tersebut') merupakan pembeli-pembeli dan pemilik-pemilik untuk unit-unit petak perumahan individu dalam pembangunan perumahan kondominium peranginan mewah di Melaka yang dikenali sebagai Riviera Bay Resort Condominium ('RBRC'). RBRC terdiri daripada bangunan bertingkat tinggi 550 petak disub-bahagikan dan hartanah bersama, yang tidak terdiri dalam 550 petak itu. Oleh kerana 550 petak yang disub-bahagikan dalam RBRC itu telah dipersetujui untuk diberikan hakmilik strata kepada pembeli-pembeli dan pemilik-pemilik unit-unit petak perumahan itu, RBRC dikawal oleh Akta Hakmilik Strata 1985. Tambahan pula, RBRC juga tertakluk kepada dan dikawal oleh Akta Pembangunan Perumahan 1966 dan Peraturan-Peraturan Pemaju-Pemaju Perumahan 1989 ('Peraturan'). Pada masa plaintif-plaintif memasuki jual beli RBRC, tiada kawalan statutori berhubung bagaimana hartanah bersama itu digunakan, dibahagikan atau dirizabkan oleh pemaju. Oleh itu, isu hartanah bersama telah dilakukan melalui surat ikatan waad bersama ('SWB'). Defendan/perayu ('defendan') merupakan pembeli 149 daripada 550 petak RBRC dan juga beberapa bahagian hartanah bersama daripada Danaharta di bawah jualan statutori. Plaintif-plaintif telah memfailkan guaman sivil terhadap defendan mendakwa bahawa perjanjian jual beli yang dimasuki defendan untuk belian 149 petak RBRC adalah menyalahi undang-undang, terbatal dan tidak boleh dikuatkuasakan kerana ia bukan dalam bentuk yang

ditetapkan dalam Jadual H dan oleh itu jelas bertentangan peraturan 11 Peraturan itu. Dalam premis itu plaintif mendakwa bahawa defendan bukan pembeli atau pemilik mana-mana petak dalam RBRC dan tidak memperoleh apa-apa hak dalam hartanah bersama itu. Plaintif-plaintif juga mendakwa bahawa keseluruhan hartanah bersama itu terletak pada pemaju/penjual asal RBRC, yang memegang yang sama sebagai pemegang amanah konstruktif untuk kesemua pembeli-pembeli 550 petak. Oleh itu, ia adalah hujah plaintif-plaintif bahawa defendan tidak berhak menggunakan, mendiami atau menikmati mana-mana bahagian hartanah bersama itu. Melalui guaman ini plaintif-plaintif memohon, antara lain, deklarasi bahawa keseluruhan hartanah bersama itu terletak pada pemaju/penjual asal RBRC (sekarang berada dalam likuidasi), yang memegang yang sama sebagai pemegang amanah konstruktif untuk kesemua pembeli 550 petak dalam RBRC dan bahawa defendan tidak berhak menggunakan, mendiami atau menikmati hartanah bersama dalam RBRC. Plaintif-plaintif juga memohon untuk injunksi bagi menghalang defendan daripada menggunakan, mendiami atau menjalankan apa-apa aktiviti komersial dalam hartanah bersama dalam RBRC dan juga ganti rugi kerana pencerobohan dan kacau ganggu dengan faedah dan kos. Hakim perbicaraan memutuskan bahawa projek kondominium itu terdiri daripada 550 petak dalam RBRC dan bahawa baki tanah itu, yang dirujuk sebagai hartanah bersama, tidak mungkin menjadi hal perkara jualan itu. Justeru rayuan ini di mana defendan mendakwa bahawa hakim perbicaraan telah terkhilaf dari segi fakta dan undang-undang dengan tidak mengambil kira fakta bahawa setiap daripada plaintif-plaintif itu telah secara sukarela menandatangani SWB apabila mereka memasuki perjanjian jual beli dengan pemaju/penjual asal. Defendan berhujah bahawa di bawah terma-terma SWB plaintif-plaintif telah mengakui bahawa RBRC telah direka dan diniatkan untuk beroperasi sebagai projek kondominium dan pusat peranginan percutian dan bahawa 22 kemudahan tambahan untuk pusat peranginan itu, yang telah diperoleh oleh defendan, tidak membentuk sebahagian hartanah bersama itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Plaintif-plaintif sebagai pembeli-pembeli telah menandatangani PJB dan SWB itu apabila mereka membeli petak-petak mereka masing-masing. Oleh itu perjanjian tersebut, yang telah dilaksanakan semasa, membentuk sebahagian dariapada satu transaksi dan patut dibaca bersama seperti ia adalah satu bagi tujuan memastikan niat pihak-pihak. Di bawah PJB itu, plaintif-plaintif telah meneliti sepenuhnya tentang fakta bahawa hartanah bersama atau kemudahan RBRC tidak membentuk sebahagian daripada hal hartanah itu. Bahkan, hartanah bersama atau kemudahan RBRC, yang terdiri daripada 22 kemudahan untuk pusat peranginan itu dengan kawasan seluasn 78,943 kaki persegi, telah diperoleh oleh defendan bersama dengan 149 petak RBRC.

Tambahan pula, terma-terma SWB, khususnya fasal 4.1 SWB itu menunjukkan bahawa kemudahan tambahan itu dengan jelas dikecualikan daripada hartanah bersama itu. Walau bagaimanapun, hakim perbicaraan langsung tidak menghiraukan SWB itu dan telah membuat kesilapan besar apabila beliau mendapati bahawa kemudahan tambahan tersebut adalah hartanah bersama RBRC. Kegagalan hakim perbicaraan untuk membuat rujukan kepada SWB dan kegagalan untuk memahami bahawa 22 kemudahan yang dibeli oleh defendan daripada Danaharta bukan kemudahan yang sama dibeli oleh plaintif daripada pemaju adalah salah arah yang material. Ketiadaan arahan ini merupakan suatu salah arah, yang mewajarkan campur tangan pihak rayuan (lihat perenggan 8(a)–(e) & (l)).

(2) Selanjutnya, plaintif-plaintif telah memasuki SWB dengan mengetahui tentang fakta bahawa RBRC telah direka dan diniatkan untuk beroperasi sebagai pusat peranginan percutian dan projek komdominium dan telah bersetuju bahawa terdapat beberapa kemudahan tambahan dalam RBRC (22 kemudahan tambahan itu), yang tidak membentuk sebahagian daripada hartanah bersama itu. Walau bagaimanapun, plaintif-plaintif secara konvenien tidak menghiraukan perjanjian mereka dengan pemaju, apabila mereka memulakan tindakan ini terhadap defendan (lihat perenggan 8(f)–(g) & (i)).

(3) Ia adalah jelas bahawa plaintif-plaintif menyetujui dan mengutuk dengan niat untuk menggagalkan terma-terma yang jelas dan taksa dan waad yang dimasuki oleh mereka dengan pemaju menurut PJB dan SWB mereka masing-masing. Apabila beberapa daripada plaintif-plaintif itu telah memajak balik petak-petak mereka kepada pemilik pusat peranginan itu, mereka tidak mendakwa bahawa 22 kemudahan tambahan itu adalah hartanah bersama. Walau bagaimanapun, selepas 15 tahun kemudian dan selepas urusan pajakan balik plaintif-plaintif tamat mereka kini mendakwa yang 22 kemudahan itu milik defendan, yang merupakan pemilik pusat peranginan sebagai hartanah bersama. Oleh demikian, plaintif-plaintif telah diestopkan daripada melaksanakan terma dan waad itu, yang telah dibenarkan dan dipersetujui dalam PJB dan SWB itu (lihat perenggan 8(j)–k)).]

Notes

For cases on common property, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5500–5515.

Cases referred to

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761, CA (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989
Strata Titles Act 1985

Appeal from: Civil Suit No 22–22 of 2010 (High Court, Malacca)

Cyrus V Das (V Sithambaram, Andrew Wong and Wong Fook Meng with him) (Chee Siah Le Kee & Partners) for the appellant.
M Pathmanathan (Sugandra Rao Naidu with him) (M Pathmanathan & Co) for the respondents.

Hamid Sultan JCA:

[1] The appellant/defendant who had purchased some condominium units as well as some parts of the common property from Danaharta under a statutory sale, appeals against the decision of the learned High Court judge who had ruled that the condominium project consists of 550 parcels of condominium only and the balance of the land, etc which is referred to common property cannot be a subject matter of sale, even when that part related to the 550 parcels which is referred to common property as well as facilities in the sale and purchase agreement ('the S&P agreement') and the deed of mutual covenant ('the DMC').

[2] In essence, the only issue in this case is whether the court should give effect to the S&P agreement as well as the DMC. If it is enforceable, the plaintiffs/respondents in this case will not be entitled to the prayers claimed. Other issues relating to law and rights of the parties will only lead to circuitous jurisprudence if in law it is not sufficient to set aside the terms of DMC, taking into consideration that thedefendant is not in breach of DMC terms in this case. The real issue is whether the S&P agreement as well as the DMC are binding on the parties. In this appeal, the parties will be referred to as they were in the High Court.

[3] The appeal came before us on 19 June 2015 and was fixed for continued hearing on 30 November 2015. We reserved judgment because of the convoluted arguments and the plaintiffs' refusal to recognise the DMC and attempt to get out of the contractual bargain which they have entered into purportedly on the ground that the DMC attempted to give away the part of the land and/or facilities in the area which is referred to common property to the original developer and which the defendant had acquired, that too by statutory sale through Danaharta. The plaintiffs' case from the pleadings,

evidence and submission appears to be to unjustly enrich themselves for property or facilities which they have not contracted for.

[4] Learned counsel for the plaintiffs puts the issue before the trial court as follows:

> The singular core issue that arose for determination was what is common property under the relevant and applicable laws in the context of a housing development.

[5] The answer to the issue is simple and straight forward, taking into consideration the time the sales and purchase agreement was concluded. At that time there was no statutory control as to how the common property is to be used or divided or reserved by the developer. It was all based on contractual terms. The Housing Development (Control and Licensing) Act 1966 and/or the Housing Development (Control and Licensing) Regulations 1989 only required a S&P to be signed as per the statutory form. The issue of common property, etc. was done through a DMC. There was no law prohibiting DMC or any case laws to say DMC is illegal, bad in law or against the Housing Development (Control and Licensing) Act 1966, Housing Development (Control and Licensing) Regulations 1989 or Strata Titles Act 1985 at the time of the S&P was entered into. Both parties concede there are no case law to that effect. If that is the case, the plaintiffs' contention has no merit as the cases relied on by the plaintiffs have no relevance to the factual matrix of this case. In any event, we will set out the facts and argument of the parties for the purpose of completeness only and our grounds is substantially based on this paragraph.

[6] The statement of claim and prayer reads as follows:

> 1. The Plaintiffs' claims against the Defendant are in relation to the luxury resort condominium housing development at Tanjung Kling, Melaka known as the Riviera Bay Resort Condominium ('RBRC'). The Plaintiffs claim as purchasers and owners of parcels.
>
> 2. The development is comprised in a high-rise building of 550 sub-divided parcels and the Common Property. The Common Property is comprised largely in various elements constructed and provided on the land on which the high-rise sub-divided building consisting of 550 parcels is constructed. The RBRC is constructed on the development area, that is to say, constructed on Lot HS(D) 21005 PT No. 37, Pekan Tanjung Kling, Section III, Daerah Melaka Tengah, Melaka ('the Lot') now known as PN 16958 and Lot 332, Town of Tg. Kling Section III, District of Central Malacca, Malacca.
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> 3. The Common Property of the RBRC is comprised in so much of the Lot as is not comprised in the 550 parcels. The parcels in the RBRC were constructed and advertised for sale by Riviera Bay Resort Condominium Sdn Bhd which is now in liquidation ('the Housing Developer').

4. The RBRC was constructed, advertised and sold by the Housing Developer under Housing Developer's Licence 5260/12-96 and Advertising Permit 5260/1299/92(12). The Approving Authority was Majlis Perbandaran Melaka Tengah PKP/MPM00335 (P).

5. As such, the RBRC was subject to and governed by the Housing Development (Control and Licensing) Act 1966 ('Act 118'), the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') and Schedule H of the Regulations. Schedule H is the statutory form of Sale and Purchase Agreement (Sub-divided Building) stipulated by R.11(1) of the Regulations.

6. The 550 sub-divided parcels in the RBRC are intended and agreed to be given strata titles to the purchasers and owners of the housing parcel units. As such, the RBRC is subject to and governed by the Strata Titles Act 1985 ('Act 318').

7. Further, the construction of the RBRC was completed and vacant possession of parcels had been delivered by the Housing Developer to purchasers before 12 April 2007 but no management corporation under Act 318 has come into existence. Accordingly, the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663') applies to and governs in relation to the maintenance and management of the Common Property of the RBRC.

8. The category of land use of the Lot and the RBRC is condominiums only. Accordingly, no part of it or its Common Property can be used or converted to any commercial purpose. This prohibition applies to the operation of a commercial hotel in the RBRC.

9. The Common Property as defined by Act 318 'means so much of the Lot as is not comprised in any parcel {including any accessory parcel) or any provisional block as shown in an approved strata plan'.

10. Schedule H of the statutory Sale and Purchase Agreement (Sub-divided Building) defines 'Common Property' as follows:

> 'Common Property' means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, wires, cables and ducts and all other partitions and installations used or capable of being used or enjoyed in common by all the purchasers'.

11. The RBRC has no accessory parcel or provisional block.

12. Act 663 defines Common Property as follows:

> 'Common property, in relation to a development area, means so much of the development are as is not comprised in any parcel, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires,

cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas; driveways, car parks and parking areas, open spaces, landscape areas, walls and fences and all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by ail the occupiers of the building'.

13. Section 44 of Act 663 further provides that:

'44. Non-application of other written laws, contracts and deeds.

On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority or that other area'.

14. The Plaintiffs say that there are only 550 parcels in the RBRC. All are in the large high-rise building. Accordingly, all elements outside and not comprised in the 550 parcels constitute the Common Property of the RBRC.

15. In particular, the Plaintiffs say that the following elements are construction the Lot are not parcels and accordingly form part of the Common Property of the RBRC:

1. Chinese Restaurant

2. Hotel Arcade (Convenience Store, Hair Salon, Game Room, Tour Desk Room & Bakery)

3. Coffee House

4. Reception and Lobby Lounge

5. Bar Lounge (Mezzanine Floor)

6. Kitchen

7. Health Centre

8. Boat Storage

9. Disco Lounge and Karaoke

10. Beach Front Snack Area, Kitchenette & Storage Area

11. Hotel Backhouse

12. Staff Canteen

13. Recreation Centre (Ballroom, Seminar rooms, Administration offices, Kitchen and squash court).

16. By virtue of the Sale and Purchase Agreement (Sub-divided Building), that is to say in the form of Schedule H and Section 34 of Act 118, the Plaintiffs who are owners of parcels in the RBRC have the right of use which they would have if the other parcel owners were co-proprietors thereof. In law, they are tenants-in-common of the Common Property.

17. The Plaintiffs further assert and affirm that as the RBRC is entirely a housing development, no particular parcel owner or group of parcel owners may use any element of the Common Property in derogation of the rights of the Plaintiffs and other parcel owners or for the economic benefit of such parcel owner or group of parcel owners. All elements of Common Property must be used and employed for the communal benefit of all parcel owners.

18. Section 79 of Act 318 provides that the Limitation Act 1953 does not extend to common property. As the RBRC is a registered land, the Land Code prohibits acquisition of ownership or title by adverse possession.

19. Regulation 6(2) of the Regulations requires that 'licence housing developer shall issue a brochure in respect of the housing accommodation to each purchaser free of charge'.

20. The Housing Developer, complying with the above regulation, issued a brochure in respect of the RBRC. The Plaintiffs say that the promissory contents of the brochure have binding force on the Housing Developer and its assignees and successors.

21. The brochure stated that that the Land Facilities of the RBRC are as stated in Schedule A annexed hereto.

22. The brochure further stated that the Sea Facilities are as stated in Schedule B annexed hereto.

23. The Plaintiffs say that the land and sea facilities in so far as they are part of the RBRC would be part of the Common Property of the RBRC for the common and communal benefit of the owners (eventually proprietors) of the parcels.

24. Further, the common elements and common facilities constituting the Common Property come under the control and management of the Common Management Body ('CMB') before the management corporation comes into existence.

25. By Section 42 of Act 318, after the management corporation comes into existence, the management corporation of the RBRC 'shall become the proprietor of the common property and be the custodian of the issue document of title of the lot' on which the RBRC is constructed. By the same section, the management corporation 'shall not have power to transfer any portion of the common property which forms part of the building or of the land on which the building stands'. Registered title to the Common Property can be issued only to the Management Corporation.

26. Until the formation of the management corporation of the RBRC, the Common Property of the RBRC and every element of it is vested in the Developer (now in liquidation). As the Housing Developer has sold parcels in the RBRC with the appertinent right of user of the Common Property, the Housing Developer as represented by the Official Assignee/Receiver, is a bare or constructive trustee of the Common Property of the RBRC for the benefit of the parcel owners or co-proprietors, that is to say as tenants-in-common.

27. The Defendant claims to be the purchaser of 149 of the 550 parcels of the RBRC. The Defendant traces its ownership and status as purchaser of the 149 parcels to a sale and purchase agreement made on 1 November 1995 between the Housing Developer and its subsidiary company, Riviera Bay Resort & Condo Management Sdn Bhd ('the illegal agreement').

28. The Plaintiffs say that the illegal agreement is illegal, void, invalid, prohibited and unenforceable on the following grounds:

(1) Regulation 11(1) of the Regulations mandatorily provides that if the contract of sale is for the sale and purchase of a housing accommodation in a sub-divided building, it shall be in the form prescribed in Schedule H.

(2) Regulation 13 of the Regulations makes it a criminal offence for the Housing Developer who contravenes the Regulations and ail those who knowingly and wilfully aid, abet, counsel, procure or command the commission of the contravention of the Regulations. This includes the lawyers who prepared the offending agreement.

(3) The RBRC is entirely a housing accommodation sub-divided building. Accordingly, the illegal agreement is in blatant violation of Regulation 11.

(4) The illegal agreement is in rejection of general contractual and statutory cross covenants and common covenants which are essential to the strata title scheme conceived by Act 318.

(5) The illegal agreement is in violation of the important provisions of Act 318.

(6) The illegal agreement is a fraud on purchasers who relied on and purchased parcels adhering to the sale and purchase agreement in the form of Schedule H.

(7) The illegal agreement is bad and void under Section 44 of Act 663.

(8) Accordingly, the illegal agreement should be found and held to be illegal, void, invalid, prohibited and unenforceable.

29. The Plaintiffs say that all agreements, transfers, assignments and conveyances based on and flowing from the illegal agreement are for the same reasons illegal, void, invalid, prohibited and unenforceable.

30. In the premises, the Defendant is not a purchaser or owner of any parcel or any rights in the Common Property appurtenant to any parcel housing units.

31. If the Honorable Court is not inclined to hold that what as stated above, the Plaintiffs say that, the Defendant by way of an absolute assignment, that is to say a jual janji, transferred its ownership rights, if any, to Affin Islamic Bank Berhad. Accordingly, the Defendant is not a owner or purchaser of any parcel unit of the RBRC.

32. So it is not entitled to any right with respect to any parcel in the RBRC or any element of the Common Property of the RBRC.

33. If the Court is not disposed to granting the relief sought above, the Plaintiffs say that, as no strata title has been issued in respect of the 550 parcels in the RBRC, all entitlements of all purchasers including the rights and claims of the Defendant and its predecessors, if any, are only equitable.

34. The Plaintiffs further assert and affirm that the Plaintiffs' rights arose prior in time and the Defendant came later. Accordingly, the Defendant's rights, if any, are void, invalid, prohibited and unenforceable against the Plaintiffs and their rights and entitlements.

35. Section 4 of Act 663 provides that a Joint Management Body ('JMB') consisting of the developer and the purchasers. Section 6 of the Act provides that the JMB may elect a Joint management Committee ('JMC') which is empowered to perform its duties and conduct its business on its behalf and for that purpose any of its powers. Such election is by a majority of purchasers present and by show of hands without regard to the number of parcels he owns. No purchaser (except joint individual' purchasers) is permitted to vote by proxy or by the weight of the number of parcels he owns.

36. The JMC is to be elected during the first meeting of the JMB and any subsequent general meeting. It is to consist of the developer and not less than five and not more than twelve purchasers to hold office for a period not exceeding three years.

37. At the first meeting of the JMB, it purported to elect 12 members. The Defendant's director, Dennis Tan Chin Yong, representing the Defendant was one of them. Four individuals who are not purchasers or owners of any parcel in the RBRC were also purportedly elected. Accordingly, it was decided by JMC and the Commissioner of Buildings ('COB') that the four individuals cannot be JMC members. The COB is the Public Office in charge of the administration of Act 663.

38. Thereafter, the Defendant's director, Dennis Tan Chin Yong purported to act as the Chairman of the JMC and began to operate a pseudo JMC and did various wrongful, illegal and unauthorized acts including collection of charges for the maintenance and management of building and common

property and wrongfully and unauthorized convening of emergency general meetings. He has rejected the authority and decision of the COB.

39. The Plaintiffs do not recognize or accept the pseudo committee or its acts and say that they are unauthorized, unlawful and illegal.

40. The Defendant since 2006 has been in unlawful occupation of most of the elements of the Common Property claiming that those elements of Common Property are parcels and it is the exclusive owner thereof. The unlawful occupation and use of the Common Property constitute trespass, nuisance, breach of statute and fraud on the Plaintiffs. By reason of such unlawful occupation and use of the Common Property and carrying on commercial activities thereon, the Defendant has been deriving monetary benefits. The Plaintiffs claim those benefits as damages payable by the Defendant to the Plaintiffs.

41. Based on the above facts and propositions, the Plaintiffs seek the following reliefs and remedies:

(1) A declaration that the condominium housing development known as Riviera Bay Resort Condominiums constructed on Lot HS(D) 21005 PT No. 37, Pekan Tanjung Kling, Section III, Daerah Melaka Tengah, Melaka ('the Lot') now known as PN 16958 and Lot 332, Town of Tg. Kling Section III, District of Central Malacca, Malacca (Master Title) and sold under Advertisement and Sale Permit No. 5260/1299/92(12) is comprised of 550 parcel units and the Common Property shown in the Building Plans approved by the relevant government authorities ('the RBRC Condominium'). The Common Property of the RBRC is comprised in so much of the Lot as is not comprised in the 550 parcels;

(2) A declaration the entire Common Property so defined and described is vested in the Developer-Vendor (Riviera Bay Resort Condominium Sdn Bhd now in liquidation No. 28-35-2000) as constructive trustee of all purchasers, that is to say purchasers of the 550 parcels;

(3) A declaration that the Defendants, their servants, agents and proxies are not entitled to as purported purchase, owners, licensees or otherwise, any or any exclusive use, occupation or enjoyment of any portion of the Common Property;

(4) A declaration that the Defendants and their servants, agents and proxies are tortfeasors for being in unlawful use and occupation of sizeable parts of the Common Property and unlawful and illegitimate interference with the lawful and reasonable right of the Plaintiffs and other bona fide parcel purchasers and owners in relation to the use and enjoyment of the Common Property in its entirety;

(5) An injunction restraining the Defendants whether by themselves or by their servants or agents or proxies from exclusively or otherwise using, occupying and carrying on commercial activities or operating a hotel on any part of the Common Property of the RBRC condominium;

(6) A declaration that the Defendants are not in law purchasers, owners or

proprietors of 149 parcel units or any part of the Common Property of the RBRC as claimed by them;

(7) An injunction that the Defendants by themselves or their servants or representatives or proxies be restrained from calling for or participating or casting any vote in any meeting of the Joint Management Body of the RBRC condominium or the Joint Management Committee managing the building and Common Property of the RBRC;

(8) A declaration that the self-proclaimed Joint Management Committee consisting of predominantly employees of the Defendants and all its acts are illegal, invalid and contrary to law;

(9) An inquiry as to damages for trespass and nuisance and illegal use and occupation of the Common Property of RBRC;

(10) Interest on the said damages pursuant to Section 11 of the Civil Law Act 1956;

(11) Costs;

(12) Such further or other order as the Honourable Court may deem just and proper.

[7] The memorandum of appeal reads as follows:

1. The Learned Judge had misdirected himself both in law and in fact, when he allowed the plaintiffs claim for a declaration that Riviera Bay Resort Condominiums ('RBRC') comprised 550 parcels only when he held that the description '550 units of condominiums' in the approved building plans of RBRC meant that there can only be 550 parcels intended to be held under separate strata titles when RBRC is subdivided when he failed to consider or consider adequately that:

   (a) RBRC was a building intended for subdivision and hence in law, it can only mean a proposed parcel which had not been subdivided and therefore the final number of parcel was yet to be determined;

   (b) a parcel and the common property can only exist when the parcels are shown in an approved strata plan as defined in the Strata Titles Act 1985;

   (c) when the Learned Judge used the words '550 units of condominium' interchangeably with '550 parcels only', he had failed to appreciate that the approved building plans of RBRC described RBRC as 'mengandungi 550 unit pangsapuri, 1 unit pondok keselamatan, a bangunan rekreasi dan 1 bangunan kantin pekerja' which clearly meant that the building could be subdivided into more than 550 parcels to be held under separate strata titles.

2. The Learned Judge had seriously misdirected himself both in law and fact when he held that what was not a housing accommodation cannot be parcels in a housing development when he had failed to consider or

appreciate that there is nothing in the Housing Development (Control & Licensing) Act 1966 [Act 118] and the Housing Development (Control & Licensing) Regulations 1989 [1989 Regulations) to say that only housing accommodation units can be parcels to be held under separate strata titles for the following reasons:

(a) The Learned Judge failed to consider that Act 118 and 1989 Regulations do not regulate the type of building that can be constructed on a lot of land;

(b) The Learned Judge failed to consider that Act 118 and 1989 Regulations merely provide for the control and licensing of the business of housing development and that only if a housing developer sells a housing accommodation then the sale of that housing accommodation is regulated by Act 118 and 1989 Regulations and not otherwise;

(c) The Learned Judge failed to consider and appreciate that Act 118 or 1989 Regulations do not state that a housing developer can only sell housing units in a housing development;

(d) Act 118 or 1989 Regulations do not require a developer to lodge or file any document to state the number of parcels intended for subdivisions and there is currently no law that requires a developer to do so;

(e) Only a legend of all parcels is required to be contained in a proposed strata plan at the time of an application to subdivide a building under section 10 of the Strata Titles Act 1985 (Act 318), which application has not been made as yet;

(f) The Learned Judge misdirected himself both in law and in fact held that in relation to Regulation 5 of the Housing Developers (Control & Licensing) Regulations 1989 (which were applicable at the material time), the approved building plans must show the number of parcels or units of housing accommodation in the housing development, when there was no such requirement.

3. The Learned Judge misdirected himself when he failed to take into consideration that in each of the sale and purchase agreement between the respective plaintiffs and the developer ('the plaintiffs' SPA) that:

(a) the plaintiffs' SPA did not make any mention or reference to 550 parcels in RBRC;

(b) the plaintiffs' SPA did not make any reference to the approved building plans adduced before the court, but made reference to some other building plans which were not before the court;

(c) the approved building plans adduced before the court was approved on 06/06/1995 when all the plaintiffs' SPA were made in year 1992, and had made reference to an approved building plan described as

Reference No: 13/91 A/B, which said plan was not produced for the court's consideration;

(d) that it is an agreed fact that RBRC was not a subdivided building but a building intended for subdivision.

4. The Learned Judge erred in law and in fact when he relied on the significance of clause 12 of the statutory agreement and yet failed to consider that from the time of execution of the plaintiffs' SPA until the date of the approved building plans adduced before the court, the building plans of RBRC had been amended at least three (3) times when:

(a) the Learned Judge erred when he found that the purchasers 'have accepted and approved' the building plans and there can be no changes or deviations without the written consent of all the purchasers, when the evidence adduced before the court was that the approved building plans had been amended at least 3 times without any written consent of all purchasers;

(b) the Learned Judge erred when he concluded that 'from the time the housing developer enters into the first Sale and Purchase Agreement with the first parcel purchaser in a housing development, the common property of that housing development had irreversibly been determined in the approved building plans', as the Learned Judge failed to consider that the approved building plans at the time of the statutory sale and purchase agreement (Year 1992) are not the same as the approved building plans adduced before the court (approved on 06/06/1995).

5. The Learned Judge erred in law and fact, when he totally ignored the provisions of a deed of mutual covenant which each of the plaintiffs voluntarily signed with the developer at the same time when they each entered into a sale and purchase agreement with the developer ('the DMC') wherein:

(a) each of the plaintiffs is aware from the outset that RBRC is designed and intended to be operated as a holiday resort cum condominium project;

(b) that the DMC provided that there will be some additional facilities which shall not, under any circumstances, form part of the common property and further that the developer shall be entitled to vary, add to or alter the additional facilities;

(c) that these additional facilities shall not form part of the common property and are intended to be held parcels and held under separate strata titles.

6. The Learned Judge misdirected himself when he found that the Principal Sale Agreement dated 01/11/1995, the Deed of Assignment dated 19/10/2006 and the sale and purchase agreement between Danaharta and the defendant dated 29/12/2005 confirmed that RBRC comprises 550 parcels only when the Learned Judge failed to read the document as a

whole, namely:

(a) In respect of the Principal Sale Agreement dated 01/11/1995:

(i) the Learned Judge was wrong to rely *ONLY* on Preamble 2 which stated that 'RIVIERA BAY RESORT CONDMINIOUMS (hereinafter referred to as 'the Project' comprising of 550 parcels of condominium and service apartment units (hereinafter referred to as 'the Project Parcels') together with various resort/recreational facilities in accordance with approved plans and specifications'.;

(ii) the Learned Judge did not consider Clause 5 which stated the vendor, was selling the balance stock of the Project Parcels not sold by the Vendor together with those resort/recreational facilities in the Project which will be issued with separate strata titles;

(iii) the Learned Judge was wrong in law and in fact when he did not take into consideration other provisions in the same agreement which clearly shows that the resort/recreational facilities sold by Vendor are intended to have separate strata titles.

(c) *In respect of the Deed of Assignment dated 19/10/1996 and the sale and purchase agreement between Danaharta and the defendant dated 29/12/2005:*

(i) the Learned Judge was wrong to rely ONLY on Recital B which stated that 'Part of the MASTER LAND has been developed as a resort project known as RIVIERA BAY RESORT CONDOMINIUMS comprising of 550 parcels of condominium and service apartment units together with various facilities, amenities, amenities and services for use as common facilities (the PROJECT)';

(ii) the Learned Judge failed to consider the entire Deed of Assignment and the sale & purchase agreement to determine what was intended by the parties;

(iii) the Learned Judge completely ignored Recital C, D, E and other provisions of said documents which expressly and clearly show that the relevant resort/recreational facilities in the Project will be issued with separate strata titles;

(iv) the Learned Judge failed to appreciate and take into consideration that the 'various facilities, amenities, amenities and services for use as common facilities' specified in the said recital B of the said documents meant the common facilities which are described in Second Schedule of the sale and purchase agreement between the developer and each purchaser and that these common facilities are not the same as the resort/recreational facilities sold and intended to be issued with separate strata titles.

(v) the Learned Judge misdirected himself when he made a finding that the defendant's own agreement with Danaharta confirmed that

there are only 550 parcels in the RBRC.

(vi) the Learned Judge failed to appreciate and take into consideration that in the assignment between Danaharta and the defendant dated 19/10/2006, the Official Receiver & Provisional Liquidator of the Developer (In Liquidation) had agreed and undertook to assist in the execution of a registrable memorandum of transfer of, inter alia, the 22 resort facilities sold by Danaharta to the defendant.

(vii) the Learned Judge failed to appreciate and take into consideration that the defendant had, at all material times, paid maintenance or service charges in respect of the 22 resort facilities.

(viii) the Learned Judge failed to appreciate and take into consideration that the survey fees relating to subdivision of the 22 resort facilities into parcels to be held under separate strata titles have been paid to the Official Receiver & Provisional Liquidator way back in February 2004.

7. The Learned Judge erred in law and in fact when he failed to take into consideration the common facilities set out in the Second Schedule of the plaintiffs' SPA:

(a) are the only facilities that are to be used or capable of being used or enjoyed in common by all the purchasers of RBRC;

(b) that the said common facilities are not part of the properties acquired by the defendant from Danaharta;

(c) that all the plaintiffs testified that the said common facilities are not the same as those acquired by the defendant from Danaharta.

8. The Learned Judge erred in law and in fact when he relied on the approved building plans adduced before the court to support his finding that RBRC has only 550 parcels when he failed to consider or consider adequately that:

(a) nowhere in the approved building plan was there any reference to 'parcels';

(b) all the plaintiffs who testified in court, agreed with the defendant under cross examination that the word 'parcel' or 'common property' do not appear in the approved building plans;

(c) the evidence of the architect, Teh Keng Seng (SP8) confirmed that the building plans drawn up by him and approved by the local authority are not intended to indicate what will become parcels and what will not;

(d) the approved building plan did not merely state '550 units of condominiums' but the approved building plans also went on to state '1 yunit pondok keselamatan, 1 bangunan rekreasi, 1 yunit canteen pekerja';

(e) the certificate of fitness for occupation ('CFO') relating to the building constructed in accordance with the approved building plans stated the building is suitable for use as a 'condominium and resort';

(f) the CFO states that the building was constructed in accordance with the approved building plans, which meant that the building plans were approved not only for construction of 550 units of condominiums but also for the construction of resort facilities;

(g) the express condition on the issue document of title relating to the lot of land on which RBRBC was constructed is stated as 'Untuk kondominium dan resort sahaja' and is not 'Untuk kondominium sahaja';

(h) the approved building plans do not show areas which are intended to be parcels or areas which are intended to be common property as all parcels common property and accessory parcels will only be shown in a proposed strata plan to be submitted to the appropriate authority in an application for subdivision under s. 10 of Act 318, which has yet to take place.

9. The Learned Judge erred in law and in fact when he found that the project architect Teh Keng Seng (SP 8) had confirmed in his evidence before the court that the approved building plans were for only 550 parcels of condominium and service apartment units when such a finding is contrary to the evidence of SP 8, namely:

(a) that the architect, under cross examination, said that when he used the word parcel he did not mean a parcel to be held under strata title;

(b) that the architect, under cross examination, had denied that he had confirmed to the tenth plaintiff that there are only 550 parcels in RBRC;

(c) that the architect had confirmed that the building plans drawn up by him and approved by the local authority are not intended to indicate what will become parcels and what will not;

(d) that the architect did not confirm 550 parcels but to the contrary had consistently used the words '550 units' or '550 parcel units'.

10. The Learned Judge erred in law and in fact when he relied on an architectural biodata produced by the project architect (SP 8) and failed to take into consideration that:

(a) the architectural biodata was prepared for a 16 storey building when the final approved building plans were for a 14 storey building;

(b) the architectural biodata included designs for purchasing and receiving place; a business centre; a hotel front office and hotel arcade and a hotel cafe;

(c) the resort facilities listed in the architectural biodata are different from the common facilities set out in the Second Schedule of the plaintiff's SPA;

(d) SP 8 had applied to the local authority for a CFO for the building to be used as a condominium and resort;

(e) the architectural biodata clearly showed that RBRC was designed for a condominium and resort and not just for a condominium.

11. The Learned Judge misdirected himself when he found that the project architect Teh Keng Seng (SP 8) had testified that *'in an application for strata titles under* section 20 of the STA, *the architect is required to certify that the RBRC is completed in accordance with the approved building plans and that he can only certify that there are only 550 parcels in RBRC and not 579 parcels as contended by the Defendant'* and failed to take into consideration that SP 8 did not at any time in his testimony before the court say that 'he can only certify 550 parcels in RBRC and not 579 parcels'.

12. The Learned Judge misdirected himself when he found that SP 8 'to be professional and credible in his testimony' and is 'someone who was responsible and truthful' when the Learned Judge failed to take into consideration that SP 8's testimony (particularly in cross-examination) contradicted the documentary evidence produced by both the Plaintiff and Defendants showing that SP 8's evidence is not credible and reliable.

13. The Learned Judge failed to consider the following evidence which confirmed that RBRC also comprised a hotel resort with 22 other titled facilities when he did not take into the account the following:

(a) although SP 8 told the court that he designed a condominium project only, yet he applied for a certificate that states that the building is suitable for use as a condominium and resort;

(b) SP 8's architectural biodata showed he had designed areas for 'purchasing and receiving', 'business centre', 'hotel front office and hotel arcade', and 'hotel cafe' which confirmed that RBRC was a hotel resort cum condominium;

(c) P15 supports an irresistible inference that the building is intended to also be a hotel resort and does not support the plaintiff's claim that RBRC can only be subdivided into 550 parcels to be held under strata titles.

14. The Learned Judge misdirected himself both in law and in fact when he held that the approved building plans defines and demarcates the parcels in the housing development which are clearly demarcated, delineated and shaded red in the layout plan in the individual statutory sale and purchase agreement when he had failed to consider or appreciate the evidence of the architect that the approved building plans are not intended to demarcate what will become parcels and what will not.

15. The Learned Judge misdirected himself both in law and in fact when he held that from the definition of 'common property' in section 2 of the Building and Common Property (Maintenance and Management) Act 2007, common property 'encompasses all the facilities', when he failed to consider or appreciate that:

    (a) a facility is not automatically a common property;

    (b) the description of the elements after the words *'such as'* is only intended to be examples of elements that can constitute common property and is not intended to mean that all the elements described therein shall become common property;

    (c) the words 'and all other facilities and installations' must be read together with 'used or capable of being used or enjoyed in common by all occupiers' and that all such facilities are intended to refer to the common facilities set out in the Second Schedule of the relevant sale and purchase agreement between the developer and all purchasers.

16. The Learned Judge misdirected himself both in law and in fact when he held that in a housing development only housing units can be made parcels to be held under separate strata titles.

17. The Learned Judge erred in law and in fact when he dismissed, as without merit, the defendant's contention that the plaintiffs' claim is not a disclosed claim within the meaning of the Pengurusan Danaharta Nasional Berhad Act 1998 and also when he held that *'In any event, the Plaintiffs are not making a claim against Danaharta'* for the following reasons:

    (a) the learned Judge failed to consider or appreciate that since the resort facilities were vested in the defendant under the provisions of the said Act, the plaintiffs are precluded from claiming that they have a prior interest, whether legal or equitable;

    (b) the Learned Judge failed to consider or appreciate that the relevant provisions of the said Act do not only apply to a claim against Danaharta but also apply to any claim or proceedings against the defendant, by virtue of sections 14(6) and 19(2) of the said Act.

18. The Learned Judge misdirected himself when he held that the defendant's director Dennis Tan Chin Yong agreed that there are 550 parcels of condominiums and that whatever is not comprised in a parcel is common property when he failed to appreciate or consider that:

    (a) The said witness had used the word '550' in conjunction with the word 'condominiums' only;

    (b) The said witness had also stated that the 22 facilities are intended to be;

    (c) parcels to be held under separate strata titles.

19. The Learned Judge misdirected himself in weighing the evidence of Lee Swee Kee, a licensed land surveyor, when he failed to appreciate that:

    (a) In respect of RBRC, right from the outset, all purchasers knew that that there will some additional facilities in RBRC which will not form part of the common property.

    (b) In an application for subdivision of a building into parcels to be held under separate strata titles, the application prepared by a licensed land surveyor is regulated by the Strata Titles Act 1985 and not by the Building and Common Property (Maintenance and Management) Act 2007 or the Housing Development (Control & Licensing) Act 1966.

    (c) The licensed land surveyor's preparation for an application to subdivide RBRC into 579 parcels was the same before the liquidation of the developer and after the liquidation of the developer as the Official Receiver & Provisional Liquidator had also instructed him to proceed to subdivide RBRC into 579 parcels.

    (d) The licensed land surveyor had agreed with the architect's testimony that the building plans drawn up by the architect are not intended to indicate what would be parcels to be held under strata titles and what would not.

    (e) The licensed land surveyor had testified to the court that there can be no parcels unless shown in an approved strata plan under the Strata Titles Act 1985, and that there cannot be any common property unless there is an approved strata plan.

    (f) The licensed land surveyor had testified to the court that his preparation for subdivision of RBRC was based on the approved buildings plans.

20. The Learned Judge misdirected himself in law and in fact when he relied on the decision of the Court of Appeal in *Malaysian Land Properties Sdn Bhd v Waldorf and Windsor Joint Management Body* [Court of Appeal Civil Appeal No. W- 02NCVC(W)-1150-05/2012] when he failed to consider or appreciate that the facts in Malaysian Land Properties are totally different from the instant case.

21. The Learned Judge misdirected himself in law and in fact when he relied on the decision, in *JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd* [2013] 9 MLJ 714 when he held that the issue of whether a clubhouse is common property 'was a matter of law' as he failed to consider or appreciate that in that case, the clubhouse was a common facility under the Second Schedule to the statutory sale and purchase agreement.

22. The Learned Judge misdirected himself in law and in fact when he held that the Strata Titles Act 1985 (Act 318), inter alia, confirm that RBRC has only 550 parcels or units, when he totally ignored the relevant provisions of Act 318 when:

A

(a) the definition of common property in section 4, which defines property as so much of the lot as is not comprised in any parcel as shown in an approved strata plan;

(b) in the case of RBRC there is no approved strata plan and that this means that the parcels and the common property in RBRC have yet to be defined, demarcated or delineated or yet to be determined;

B

(c) the provisions of Act 318 and in law, common property can only exist when the parcels are shown in an approved strata plan.

C

[8] We have read the appeal record and the able submission of the parties. After giving much consideration to the same, we take the view that the appeal must be allowed and our reasons are as follows:

D

(a) we agree with the submission of learned counsel for the defendant that the plaintiffs are bound by the S&P as well as the DMC;

E

(b) the purchasers signed the S&P and the DMC when they purchased their respective parcels. The agreements which were executed contemporaneously, in our opinion, formed part of one transaction as such ought to be read together as if they were one in order to ascertain the intention of the parties (*Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165; *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464);

F

G

(c) Under the S&P, the plaintiffs were fully appraised of the fact that the common property or facilities of the Riviera Bay Resort Condominium ('the RBRC') only consisted of the facilities specified in the Second Schedule thereto. These facilities were being enjoyed by the plaintiffs. An important point to note is that these common facilities do not form part of the subject property comprising 22 facilities with an area of 78,943 sq ft acquired by the defendant together with 149 parcels from Pengurusan Danaharta Nasional Berhad ('Danaharta'). The subject property in fact, relates to the 'Additional Facilities', 22 altogether, set out in the Second Schedule to the DMC being facilities for the resort. These additional facilities were excluded from the common property defined in the S&P. The learned judge therefore made a fundamental mistake when His Lordship found that these additional facilities were common property of the RBRC. There is clearly a distinction between the common property or facilities with the additional facilities;

H

I

(d) the plaintiffs entered into the DMC fully cognisant of the purpose of the project, that is, it was designed and intended to be operated as a holiday resort cum condominium project. This is clearly stated in recital 2. By recital 3, it is stated that:

> In order that the Vendor maybe able to have the Project operated as a holiday resort cum condominium project the parties hereto agree to enter into this Deed of Mutual Covenants on the terms and conditions hereinafter contained.

In cl 4.1 of the DMC, it is provided that –

> The Purchaser hereby agrees, covenants and undertakes that Vendor may provide at its discretion the Additional Facilities for the use and enjoyment of the Purchaser and other invitees of the Vendor as set out in the Second Schedule hereto. *For the avoidance of doubt it is hereby declared that 'Additional Facilities including the car park shall not under any circumstances form part of the Common Property and the ownership of the Additional Facilities shall remain solely with the Vendor'.* (Emphasis added.)

The above terms of the DMC provide an unequivocal and clear indication that the additional facilities are expressly excluded from the common property and the ownership thereof remain solely with the developer;

(e) the learned High Court judge, however, completely disregarded the DMC which declares that the additional facilities 'shall not under any circumstances form part of the common property'. In our judgment, the S&P and the DMC when read together will show that the common facilities specified in the Second Schedule of the S&P are the only facilities that are to be used or capable of being used or enjoyed in common by all the purchasers of RBRC including the plaintiffs;

(f) further, it is crystal clear that the plaintiffs knew from the time they entered into the S&P and the DMC that RBRC was designed and intended to operate as a holiday resort cum condominium project and most significantly they agreed that there would be some additional facilities in RBRC (the 22 facilities), which would not form part of the common property. The plaintiffs therefore have conveniently disregarded their agreements with the developer when they commenced this action against the defendant;

(g) in fact, it is in evidence that when the project was completed and the certificate of fitness for occupation was issued by the local authority in November 1995, the facilities were used and occupied by the developer and/or resort operator to run a holiday resort cum condominium. Many

purchasers including some of the plaintiffs had leased back their condominium units to the developer and were in return paid rental by the developer;

(h) the evidence of the plaintiffs will confirm that they readily acknowledged that the 22 facilities were indeed separate and distinct from the common facility referred to in the S&P. SP3 (one of the purchasers), SP4 (the eighth plaintiff) and SP5 (the first plaintiff) in their evidence agreed that from 1995 until 2006 the same 22 facilities now claimed were physically occupied by the developer to run the resort. In fact SP6, (the ninth plaintiff) while confirming that between 1995 and 2006 the same 22 facilities now claimed were occupied and used by the developer or resort operators to run the resort, he also stated that between 1995 and 2006, he did not make any claim that the developer/resort operators were in unlawful occupation of the same 22 facilities;

(i) thus, the 22 facilities were part of the holiday resort operated by the developer and/or resort operator from 1995 and later by the defendant since 2006 until sometime after the plaintiffs filed this claim in 2010. In short, the holiday resort was not a new operation after the defendant bought the 149 parcels with the 22 facilities from Danaharta contrary to the learned judge's finding in para 18 of his grounds of judgment;

(j) arising from the above, it is abundantly clear that the plaintiffs are 'blowing hot and cold' with an obvious intent to defeat the clear and unambiguous terms and covenants they had entered with the developer pursuant to their respective S&P's and DMC. It is trite law that a litigant cannot approbate and subsequently reprobate according to his whims and fancies. When some of the plaintiffs leased back their parcels to the resort operator, they had not claimed that the 22 facilities were common property but some 15 years later and after the plaintiffs ended their leaseback arrangement, they are now claiming the 22 facilities belonging to the defendant, being the resort operator, as common property. It is obvious that the plaintiffs by their conduct acknowledged that the 22 facilities were part and parcel of the resort facilities operated in the complex;

(k) thus, in the case of *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal said of the principle of approbation and reprobation as follows:

> We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same

breath. On the one hand, he claims that the High Court order dated 26 July 2001 overrides or displaces a stature which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383–384:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

Accordingly, the plaintiffs are estopped from resiling from the terms and covenants which they have consented and agreed upon in the S&P and the DMC. It is inequitable that they should, after 15 years, lay claim to the subject property that has now been bought by the defendant and which they knew all along was used commercially as part of the resort facilities; and

(l) we would emphasise that by the learned judge's failure to make reference to the DMC in his grounds of judgment, he had failed to appreciate that the 22 facilities purchased by the defendant from Danaharta are not the same common facilities referred to in the S&P which the developer had entered with the plaintiffs. This material non-direction, we hold, amounts to a misdirection, which warrants appellate interference.

[9] For reasons stated above, the appeal is allowed with costs. The order of the High Court is set aside. We will hear the parties on costs and make appropriate order as to costs.

We hereby order so.

Appeal allowed with costs.

Reported by Kohila Nesan